84-696

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

AMERICAN TRUCKING ASSOCIATIONS, INC., and TIDEWATER MOTOR TRUCK ASSOCIATION,

Petitioners,

and

NATIONAL LABOR RELATIONS BOARD; HOUFF TRANSFER, INC.; INTERNATIONAL ASSOCIATION OF NVOCCS; AMERICAN WAREHOUSEMEN'S ASSOCIATION; and INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Respondents,

vs.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals apply the proper legal criteria in determining that all the work sought by the Rules on Containers is historically and functionally related to traditional longshore work?

2. Did the Court of Appeals properly disregard the restrictions imposed by maritime law in determining that the employers of longshoremen have a right to control the disputed work for the longshoremen's benefit?

PARTIES BELOW

The proceeding in the court whose judgment is sought to be reviewed involved four consolidated cases. The caption of this petition for certiorari reflects the parties in Case No. 83-1185(L).[1]

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[1] Other parties in the other consolidated cases (Case Nos. 83-1214, 83-1424 and 83-1486) include: International Association of NVOCCs; Florida Custom Brokers and Forwarders Association, Inc.; Twin Express, Inc.; International Container Express, Inc.; San Juan Freight Forwarders, Inc.; Chester, Blackburn & Roder, Inc.; Eagle, Inc.; Eller & Company, Inc.; Harrington & Company, Inc.; Strachen Shipping Company and Marine Terminals, Inc.; Coordinated Caribbean Transport, Inc.; International Longshoremen's Association, Locals 333, 846, 862, 921, 953, 970, 1248, 1355, 1416, 1416-A, 1429, 1458, 1526, 1526-A, 1624, 1680, 1736, 1783, 1784, 1819, 1840, 1922 and 1970, AFL-CIO; International Longshoremen's Association, Atlantic Coast District Council, AFL-CIO; International Longshoremen's District Council, Baltimore, Maryland; International Longshoremen's Association, Hampton Roads District Council, AFL-CIO; Hampton Roads Shipping Association; and Southeast Florida Employers Port Association.

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IN THE

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NO. _____

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American Trucking Associations, Inc., and Tidewater Motor Truck Association (ATA and TMTA)[2] petition for a writ of

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[2] Petitioner ATA, the national association of the motor carrier industry, represents affiliated members involved in the three major segments of

certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 734 F.2d 966 and may be found in the Joint Appendix of Petitioners at 1-34.[3] The Decision and Order of the National Labor Relations Board in *International Longshoremen's Ass'n (Dolphin Forwarding, Inc.)*, (*Dolphin II*) is reported at 266 NLRB 230 (1983) and may also be found in the Joint Appendix at 35-64.

JURISDICTION

The Judgment of the Court of Appeals was entered on May 9, 1984. The Petition for Rehearing and Rehearing In Banc, filed by ATA and TMTA on May 23, 1984, was denied by the Court of Appeals on July 31, 1984. Jt. App. 31-34. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

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the land surface cargo transportation industries — trucking, warehousing, and non-vessel operating common carrier (NVOCC) operations. Petitioner TMTA is an affiliate of ATA whose members are located in the Port of Hampton Roads, Virginia. Other opponents of the Rules are The International Association of NVOCCs (IANVOCCs), the national association of NVOCCs; the American Warehousemen's Association (AWA), the national association of warehousemen; Houff Transfer, Inc. (Houff) a motor carrier; and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Teamsters), a labor organization whose affiliate locals represent employees of motor carriers, warehousemen and NVOCCs.

[3] Cited hereinafter as "Jt. App. ——." Petitioners ATA and TMTA, International Ass'n. of NVOCCs, American Warehousemen's Ass'n., and International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America have joined in the preparation of the Joint Appendix.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act (29 U.S.C. § 151 *et seq.*) (NLRA) are as follows:

Section 8(b), 29 U.S.C. § 158(b), provides in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents –
>
> 4(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is:
>
> • • •
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful . . . any primary strike, or primary picketing; . . .

Section 8(e), 29 U.S.C. § 158(e), provides in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void . . .

The relevant portions of the maritime laws include the Shipping Act of 1984, Public Law No. 98-236, 98 Stat. 67 (March 20, 1984), the Maritime Labor Agreement Act of 1980, 46 U.S.C. § 801 *et seq.*, the Interstate Commerce Act,

49 U.S.C. § 2, and the Shipping Act, 1916, 46 U.S.C. §§ 812 and 814. These statutes may be found in the Joint Appendix at 259-81.

STATEMENT OF THE CASE

This Petition seeks review of a decision by the United States Court of Appeals for the Fourth Circuit affirming in part and reversing in part a decision by the NLRB in *Dolphin II*, which arose out of a remand by this Court in 1980 of an earlier decision of the Board[4] on the same subject matter. *NLRB* v. *International Longshoremen's Ass'n*, 447 U.S. 490 (1980) (*ILA*).

The subject of this litigation is the legality of the Rules on Containers (Rules) negotiated by the International Longshoremen's Association (ILA) with the Council of North Atlantic Shipping Associations (CONASA) and the New York Shipping Association (NYSA) acting as agents on behalf of vessel operating common carriers and stevedoring companies (colectively called VOCCs or Steamship Lines) which employ longshoremen. The central issue is whether the Rules advance lawful primary or unlawful secondary objectives within the meaning of §§ 8(b)(4)(B) and 8(e) of the NLRA.

The Rules seek to secure for ILA-represented longshore labor working at seaport terminals on the East and Gulf Coasts of the United States the initial loading ("stuffing") and unloading ("stripping") of containers owned or under primary lease by Steamship Lines within 50 miles of the seaports. In *ILA* the Supreme Court remanded two cases wherein the Board had held that the Rules unlawfully covered the work of loading and unloading containers performed off-pier, because the Board had incorrectly focused on the lack of ILA off-pier work traditions. The Court directed the Board on remand to

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[4] *International Longshoremen's Ass'n. (Dolphin Forwarding, Inc.)*, 236 NLRB 525 (1978) (*Dolphin I*).

focus on the ILA's on-pier work traditions in evaluating the true objectives of the Rules.

The two cases remanded by the Supreme Court were consolidated by the NLRB with six other cases pending before *ILA* and a new case initiated by ATA and TMTA alleging unlawful enforcement of the ILA's Rules in January of 1981, following the Court's Remand Order and before the Board reconsidered the case.[5] In his decision in the consolidated remand cases on September 29, 1981, Administrative Law Judge Joel A. Harmatz (ALJ), found that the Rules had a lawful primary work objective of preserving for longshoremen the work of loading and unloading certain containers, but held that the Rules had an unlawful objective as applied to certain other containers.

The distinctions between the types of businesses involved in this dispute and the types of container work performed are important to an understanding of the merits of this case. The Steamship Lines transport both loose bundles of cargo, known as break bulk cargo, and containers filled with cargo. Steamship Lines and terminal company operators contract with stevedoring companies, employing ILA labor, to perform the work of handling break bulk and containerized cargo between the ocean cargo vessels and the trucks which haul the cargo away from the piers. Motor carriers frequently haul the cargo from the piers to freight stations located within the 50 mile zones for reconsolidation and redistribution based on destination, and vice versa. Sometimes cargo is taken to a local warehouse where it is stored for various lengths of

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[5] A § 10(1) injunction against further enforcement of the Rules pending final order of the Board was issued by the District Court and affirmed by the Court of Appeals. *Pascarell* v. *New York Shipping Ass'n, Inc.*, 650 F.2d 19, *cert. denied*, 454 U.S. 832 (1981). This injunction expired when the Board issued its remand decision. The Court of Appeals for the Fourth Circuit without opinion refused to grant a stay pending appeal; and likewise the Supreme Court without opinion refused to grant a stay by order of April 17, 1983.

time before reshipment at the customer's request. Non-vessel operating common carriers (NVOCCs) consolidate small shipments and acting as shippers contract with Steamship Lines to carry a single container abroad. All of these employers in the maritime and surface transportation industries compete with one another in certain aspects of their businesses. All have work traditions which precede the introduction of container technology. The ALJ found the identification of what work duties were historically performed by what labor force "is probably one that never was and never will be subject to clear isolation between marine carriers and those who use and complement their services." Jt. App. 94.

The two basic types of containerized cargo are less-than-full container load (LCL) containers, filled with small shipments from multiple shippers to either single or multiple consignees, and full-shippers-load containers (FSL) containers, filled with cargo from a single shipper to a single consignee. Jt. App. 84.

Judge Harmatz' decision turned on the distinction he found between LCL and FSL containers and the functional relationship between the work patterns associated with these containers and the traditional work patterns of longshoremen.[6] As regards LCL container work, Judge Harmatz held that the stuffing and stripping of all LCL containers by anyone other than the beneficial owner of the cargo within 50 miles of the piers may be preserved for longshoremen by the Rules. Judge Harmatz found that the consolidation and deconsolidation services offered by NVOCCs, motor carriers and warehousemen for LCL containers were related to ocean transport and constituted direct competition with the consolidation services offered by the Steamship Lines. Jt. App. 129, 131-32. Although

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[6] In *ILA* the Supreme Court said: "The work preservation doctrine, then, must also apply to situations where unions attempt to accommodate change while preserving as much of their traditional work patterns as possible." 447 U.S. at 506.

Judge Harmatz at no point specifically found that the work patterns surrounding the loading and unloading of FSL or LCL containers by NVOCCs, motor carriers and warehousemen were historically and functionally related to traditional ILA work patterns,[7] he found that, insofar as they applied to LCL container work, the Rules constituted "a rational effort to return to the piers, work diverted by inducements and a technology promulgated by signatory steamship companies and marine terminal operators." Jt. App. 129-30. The Board adopted these findings and conclusions. Jt. App. 57.

As regards FSL container work, Judge Harmatz held that the Rules could not lawfully be applied to the stuffing and stripping of FSL containers by motor carriers and warehousemen performed as an incident to the surface transportation of cargo. Judge Harmatz found that the stripping of containers at motor carrier freight stations for the purpose of transferring the cargo from containers to road equipment, a practice known as shortstopping, is "rooted in traditional motor carrier transport cargo handling procedure" and has "no relevance to the marine leg of the intermodel network." Jt. App. 134. Similarly, Judge Harmatz found that the stuffing and stripping of FSL containers by warehousemen as an incident to indefinite storage of at least part of the cargo is "an integral part of the surface distribution system not generally duplicated at portside marine operations." Jt. App. 141. The requirement

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[7] The Supreme Court in *ILA* mandated that in determining if the objective of the Rules is to preserve the work traditionally performed by ILA employees the tribunal has to:

> [E]valuate the relationship between traditional longshore work and the work which the Rules attempt to assign to ILA members . . . . The legality of the agreement turns, as an initial matter, on whether the historical and functional relationship between this retained work and traditional longshore work can support the conclusion that the objective of the agreement was work preservation rather than the satisfaction of union goals elsewhere. 447 U.S. at 509-10.

imposed by the Rules that warehousemen store their freight for a minimum of thirty days was found to be "an impediment to inland work practices which bear no relationship to services customarily or historically available at pier side." Jt. App. 141.

The Board affirmed Judge Harmatz' findings and conclusions as regards FSL container work by motor carriers and warehousemen, but advanced a different rationale. In the Board's view, the application of the Rules to the FSL container work performed by motor carriers and warehousemen was unlawful because "the duplicative work of the longshoremen, in handling cargo which is then rehandled by truckers and warehousemen, no longer exists as a step in the cargo-handling process." Jt. App. 59.

Ignoring the reasoning of both Judge Harmatz and the Board, the Court of Appeals failed to distinguish between LCL and FSL containerwork. Rather, the Court of Appeals held that *all* the work sought by the Rules was historically and functionally related to traditional ILA work. Jt. App. 25. Without further analysis of traditional work patterns, the court justified this holding with the simplistic observation that:

> [T]raditionally, longshoremen loaded cargo piece by piece into the hold of the ship and unloaded it piece by piece from the hold. The Rules grant them the right in certain instances to load cargo piece by piece into containers and unload it piece by piece from containers. In short, containerization has simply changed the locus of the work, moving the operation shoreward. Jt. App. 25.

Based on this logic the Court of Appeals held that the Rules were lawful in their entirety.

ARGUMENT

A. The Decision of the Court of Appeals Conflicts With the Decision of this Court in *ILA*

1. The Holding That There Can Be No Finding of Secondary Intent Absent Proof That Motor Carriers Lost Work Conflicts With *ILA*.

The Court of Appeals held that the Rules cannot be unlawful in any respect absent proof they deprive off-pier motor carriers and warehousemen of work. Disagreeing with the Board's conclusion that loading and unloading FSL containers by motor carriers and warehousemen was work beyond the lawful reach of the Rules, the Court of Appeals said:

> [T]he Board conspicuously failed to ground this conclusion of law [the Rules had an "unlawful work acquisition" objective] in the only finding of fact that might support it: that the Rules, in preserving for ILA members the right to do this initial loading and unloading, somehow deprived the truckers and warehousemen of *their* off-pier work *by transferring all or some of it to longshoremen at the pier*. . . Prior to containerization, truckers and warehousemen handled the cargo break-bulk; unloading of the cargo from the hold of the ship by the longshoremen obviously did not hinder these off-pier practices. Thus, one cannot possibly maintain that the stripping of import containers at the pier would in any way prevent the identical off-pier work. To repeat, truckers and warehousemen do precisely what they did before the change in technology; *the longshoremen have acquired none of that work*. Although the longshoremen's work in this process may well duplicate the off-pier work of truckers and warehousemen, calling this set of circumstances "work acquisition" strikes us as particularly inappropriate. Jt. App. 27-28 (Emphasis added)

Thus, the Court of Appeals considered that unless work was taken away from another employer and returned to the

bargaining unit by the work preservation agreement to replace bargaining unit work eliminated by the technological advancement there can be no unlawful work preservation agreement.

In so holding the Court of Appeals misapplied the mandate of *ILA* and the principles of *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612 (1967) and *NLRB* v. *Enterprise Ass'n of Steam Pipefitters, Local 638*, 429 U.S. 507 (1977). The Supreme Court clearly rejected the work transfer rationale when it recognized that this transportation case was a model of work preservation never before dealt with. In this model there was no work transfer, per se;[8] there was total elimination of work at the interface of the longshoremen and truckers. Jt. App. 59. With respect to this new model the Court said:

> The work preservation doctrine, then, must also apply to situations where unions attempt to accommodate change while preserving as much of their *traditional work patterns* as possible.
>
> • • •
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> Identification of the work at issue in a complex case of technological *displacement* requires a careful analysis of the *traditional work patterns* that the parties are allegedly seeking to preserve, and of how the agreement seeks to accomplish that result under the changed circumstances created by the technological advance. . . *More complex cases will require a broader view*, taking into account the *transformation* of several interrelated industries or types of work; this is such a case. *ILA*, 447 U.S. at 506-07. (Emphasis added).

Clearly, the Supreme Court wrestled with the relevance of "the utterly useless task of removing the contents and then

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[8] Such was the elementary model dealt with in *National Woodwork Manufacturers*, which involved work one employee group or the other would perform. 386 U.S. at 616.

repacking them . . . [which] is nothing less than an invidious form of "featherbedding" to block full implementation of modern technological process." *ILA*, 447 U.S. at 526-27 (dissenting opinion). If the Court had felt that the duplication of containerwork on the pier and at the motor carrier's freight station prevented the Rules from having a secondary objective, it surely would not have remanded the case in 1980. The Court of Appeals should have focused on the only legally relevant inquiry—whether or not the work sought by the Rules was functionally related to traditional ILA work patterns. If the disputed work is not functionally related to the traditional work patterns of the ILA, the Rules are unlawful whether or not some surface transportation company somewhere would also perform its traditional cargo handling functions.

The Court of Appeals placed undue emphasis on the concept of "work acquisition." This term has been used to help define an unlawful secondary objective; but it was never adopted by the Board or Courts as an independent legal test of compliance with § 8(b)(4) until adopted below by the Court of Appeals.

The proscribed secondary objective is established, according to the Act, by the pressure the ILA placed on the Steamship Lines to force them "to cease doing business with any other person," including motor carriers. Work preservation is permitted only where the union's conduct is not "tactically calculated to satisfy [its] objectives elsewhere," whether or not those objectives are to deprive the employer with whom the real dispute existed of its work. *National Woodwork*, 386 U.S. at 644; *Enterprise Ass'n*, 429 U.S. at 528. The Supreme Court has also held that the object of a union's activity does not have to be the complete cessation of business; a violation occurs when a union coerces a neutral employer to merely change its method of doing business with a targeted employer. *NLRB* v. *Local* 825, *Operating Engineers*, 400 U.S. 297, 304 (1971). Since the enforcement of the Rules requires the Steamship Lines to cease doing business with motor car-

riers and other surface transportation companies by denying them containers off-pier, it is unnecessary and contrary to Supreme Court authority to examine the impact of such enforcement on the motor carriers and other employers targeted by the Rules.

However, even if such facts were relevant, the Court of Appeals hinges its no-work-acquisition conclusion on its erroneous conception that truckers and warehousemen within the 50 mile zones do not lose work when the Rules are enforced. The Court of Appeals concluded that "[o]ne cannot possibly maintain that the stripping of import containers at the pier would in any way prevent the identical off-pier work. To repeat, truckers and warehousemen do precisely what they did before the change in technology . . ." Jt. App. 28. This statement reflects the erroneous view that all motor carriers and truckers are fungible entities with each having the same interests. This view is unsupported by both logic and the record evidence.

The true and undisputed facts are that many individual affiliated members of ATA operating within the 50 mile zones will be financially devastated by the enforcement of the Rules because there will be no duplication of work opportunities. The undisputed testimony was that the enforcement of the Rules will not force container work back to the piers, but will instead force it completely out of the 50 mile zones. Jt. App. 294-302. The rehandling of break bulk cargo by some motor carrier somewhere in the heartland of America is not equivalent to the work lost by employees of a motor carrier or a warehouseman located in a port city. Warehousemen cannot move their warehouses inland. When cargo in containers is diverted beyond the 50 mile zones, due to enforcement of the Rules, the surface transportation companies within the 50 mile zones lose both the work of loading and unloading containers *and* their break bulk cargo handling work opportunities.

2. The Court of Appeals' Application of the Historical and Functional Relationship Standard Conflicts with *ILA*.

The ALJ did not specifically find that loading and unloading of LCL containers, primarily by NVOCCs, or FSL containers, by motor carriers and warehousemen, had a historical and functional relationship to traditional ILA work patterns. Instead, he held that: (a) The Rules "constitute[s] a rational effort to return to the piers, work diverted by inducements and a technology promulgated by a signatory of steamship companies and marine terminal operators, Jt. App. 129-30; (b) the work covered by the Rules was "fairly claimable" by longshoremen. Jt. App. 90, 130; and (c) "[c]ontainer handling . . . in direct competition with the maritime warehouse for short-range storage, is legitimately within the category of work subject to preservation by the ILA." Jt. App. 141-42.

In agreeing that the Rules had a general work preservation objective the Board relied only upon the work diversion theory:

> It is clear from the Administrative Law Judge's findings on consolidation that no new work was created for consolidators after containerization shipping began. Rather, a large part of the longshoremen's traditional work was *diverted* away from the pier to the consolidators. Therefore, the ILA had a lawful work preservation objective in claiming this work under the Rules. Jt. App. 58-59.

Thus, the Board clearly applied a legal concept of Steamship Line responsibility for the loss of container work by longshoremen because they had developed and adopted the container technology in the first place, Jt. App. 129-30, and they had published favorable tariff rates for the shipment of LCL cargo. Jt. App. 127.

The Supreme Court did not in *ILA* indicate that such legal concepts of work "diversion" should influence the application of the functional relationship test. The Court implicitly acknowledged that even though the Steamship Lines had helped develop container technology and had chosen to use it, nevertheless, if the work created by the new technology was not functionally related to traditional ILA work the Rules agreement was unlawful. If creation and use of container technology had been considered relevant the Court would surely have included this factor in the test it articulated in *ILA*. Its failure to do so is consistent with the majority holding in *Enterprise Ass'n*, that an employer which is party to a work preservation agreement does not lose its neutrality because it chooses to bid on work which it knows would violate the work preservation agreement. 429 U.S. at 531, dissent at 539.

Apparently recognizing that the Board had applied an erroneous legal concept of work diversion, the Court of Appeals ignored the work diversion theory and sought to justify the Board's conclusion that the Rules had a lawful work preservation objective by concluding:

> Not surprisingly, it [the Board] had little trouble finding that "the work of loading and unloading containers claimed by the Rules is functionally related to the traditional loading and unloading work of the longshoremen. Jt. App. 25.

The Court of Appeals rationalized this conclusion by likening a container to the hold of the ship and said that "containerization has simply changed the locus of the work by moving the operation shoreward." Jt. App. 25. No such factual conclution was reached by the ALJ or the Board. Furthermore, even if the locus of the work had moved shoreward, it did not leave the pier for purposes of this case. The ALJ found as a matter of fact that the traditional "jurisdiction of longshoremen began and ended at the tailgate of the truck." Jt. App. 105 n. 28. Thus, whether the longshoremen turns over break-

bulk cargo or containerized cargo to a motor carrier, traditional longshoremen's work patterns end at the interface between the two carriers.

The argument that the "locus of the work" had moved shoreward was a central argument presented to the Supreme Court in *ILA* by the proponents of the Rules.[9] In rejecting this argument in 1980, the Supreme Court recognized that the proper analysis had to go beyond a simple "matter of deciding whether a container is more like the hold of a ship [moved shoreward] or more like a big box [unloaded from a ship and turned over to a trucker]. 447 U.S. at 509 n. 23. This is so because "[t]he usefulness of a container lies precisely in the fact that it may function as an integral part of the hold while it is aboard a vessel, as a trailer when it is transported by truck, and as a part of a railroad car when it is carried by rail."[10] *Id.*

Judge Harmatz applied the proper legal standards in comparing the traditional longshoremen's "work patterns" with those of motor carriers and warehousemen handling FSL containers when he said:

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[9] ILA Brief p. 33-35.

[10] The ALJ found "that longshoremen were not the only casualties of the container revolution. A loss of work was also sustained among truckers and off-shore dockworkers. Yet the work of loading and unloading cargo is functionally indistinct whether the cargo unit be a container, tandem trailer, or vessel's hold. . ." Jt App. 121. The ALJ was referring to the physical work of loading and unloading containers by both the maritime and surface transportation industry workforces *after* the development of the technological advancement. The similarity of the physical work on containers by the two contesting workforces is not the comparison sought by the Supreme Court. Rather, it directed a comparison between the historical "work patterns" of longshoremen in "loading and unloading of ships" and the loading and unloading of modern shipping containers sought by the Rules. 447 U.S. at 509, 510.

> Although skills utilized therein are indistinct from those of deepsea longshoremen in the performance of their traditional duties, it is work assumed *for a different purpose*, and in a different segment of the transportation industry. Shortstopping is simply a carrier oriented, as distinguished from consumer oriented service, and as such neither competes with maritime cargo handling nor amounts to a subterfuge to oust longshoremen of their traditional work. To this extent, *upon delivery of a container to a motor carrier, the seaborne leg ends, the container becomes a substitute for the trailer or van, and the work beyond this interface was neither created by containerization nor does it make inroads on that traditionally made available to deepsea ILA labor by marine operators.* Jt. App. 135. (Emphasis added)

This is a clear holding that stripping and stuffing FSL containers is *not* historically and functionally related to traditional longshoremen's work. The ALJ should have reached the same conclusion regarding all container work sought by the Rules. For the Court of Appeals to hold that all container work is functionally related to traditional longshore work patterns because the hold of the ship had moved shoreword seriously conflicts with the mandate of *ILA* and usurps the authority of the Board to find that FSL container work is beyond the lawful reach of the Rules.

B. The Court of Appeals Has Decided an Important Question of Federal Law Which Should Be Settled By This Court

In *Enterprise Ass'n*, this Court held that a union violated Section 8(b)(4)(B) by attempting to enforce a work preservation clause against a subcontractor whose contractual obligation to the general contractor deprived him of the power to assign the disputed work. Since the subcontractor did not have a legal right to control the work for the benefit of the union, he was held to be a neutral target of forbidden secondary coercion.

Similarly, since the Federal Maritime Statutes prohibit the Steamship Lines from complying with the Rules, the Steamship Lines must be viewed as neutral secondary employers, and the enforcement of the Rules against them must be deemed a secondary boycott.

The Steamship Lines are not free to comply with the Rules because the Federal Maritime Statutes prohibit discrimination by these common carriers against the shipping public, including consolidators, motor carriers, warehousemen and their customers. Under long-established federal law, common carriers must offer *all* of their transportation equipment, including containers, all of which they own or have under primary lease, to the shipping public without unreasonable discrimination. *Interstate Commerce Commission* v. *Delaware L. & W. R. Co.*, 220 U.S. 235, 252 (1911) (discrimination by roalroads based on geographic location or ownership of cargo prohibited); *FMB* v. *Isbrandtsen Co.*, 356 U.S. 481 (1958) (discriminatory service prohibited); *Grace Line, Inc.* v. *FMB*, 280 F.2d 790 (2d Cir. 1960), *cert. denied*, 364 U.S. 933 (1961) (equal access to vessels required); *Flota Mercante Grancolombiana, S.A.* v. *FMC*, 302 F.2d 887 (D.C. Cir. 1962) (selective provisions of cargo space on exclusive contract basis prohibited); *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297 (1937) (contract rates for specified commodities unlawful); *California* v. *United*

States, 320 U.S. 577 (1944) (discrimination resulting from non-compensatory demurrage charges for wharf storage prohibited).

In *ILA*, this Court stated, "If the Board finds, on remand, that the Rules have a lawful work preservation objective, it will then, of course, be obliged to consider the charging parties' contention that CONASA members did not have the right to control the stuffing and stripping of containers." 447 U.S. at 511-12. This Court specifically noted petitioners' argument that the Steamship Lines are common carriers subject to government regulation and have no legal right to withhold containers or container services from their customers on a selective basis, and observed, "[t]hese contentions present difficult and complex problems which are not properly before us." 447 U.S. at 512.

Notwithstanding this Court's clear mandate, Judge Harmatz expressly refused to consider whether federal maritime law deprived the Steamship Lines of the requisite control over the work claimed by the Rules. Although Judge Harmatz perceived a "fundamental conflict between the national labor and transportation policies," he concluded that the "reconciliation of the conflict would seem beyond the province of the administrative agencies." Jt. App. 160, 172. The Board adopted Judge Harmatz' conclusion that "[e]ach administrative agency should confine itself to deciding those issues arising within its own statutory area of expertise, leaving any conflicts between national labor and transportation policies to be resolved by the courts." Jt. App. 171.

Ironically, the Court of Appeals also failed to come to grips with the impact of maritime law on the Steamship Lines' right to control the work claimed by the Rules. Although this Court in *ILA* had opined that the maritime law issue presented "difficult and complex problems," the Court of Appeals declared that the right of control argument "lacks any semblance of merit." Jt. App. 25. The Court of Appeals erroneously

asserted that the right of control argument rested on a decision by the Federal Maritime Commission, *Sea-Land Service Inc.— Proposed Rules on Containers*, 21 FMC 1 (1978), which had been vacated in *Council of North Atlantic Shipping Ass'n* v. *FMC*, No. 78-1776 (D.C. Cir. July 2, 1982).[11] Unlike the Court of Appeals, this Court recognized in *ILA* that the right of control argument did *not* depend solely on the *Sea-Land* decision, but rather rested on long-standing maritime law extending back to the Shipping Act, 1916. 447 U.S. at 512. The vacation of the FMC's order in *Sea-Land* did not nullify these statutory provisions. Furthermore, the FMC order discontinued proceedings in *Sea-Land only* on procedural grounds; the decision on the merits retains significance. In ordering the FMC to continue the proceedings, the D.C. Circuit did not hold that the Rules were lawful under maritime law. In fact, no agency and no court has ever held that the Rules are consistent with maritime law. Rather, the only entity ever to pass on this issue, the FMC, has repeatedly held that the Rules violate maritime law.[12]

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[11] The Court of Appeals erred in stating that the Court of Appeals vacated the FMC decision in *Sea-Land Service, Inc.* The FMC ruled before *ILA* that the Rules were unlawfully discriminatory in violation of the common carrier obligation. *Sea-Land Service, Inc. — Proposed Rules on Containers*, 21 FMC 1 (1978). After *ILA*, the Court of Appeals remanded the matter to the FMC to reconsider in light of *ILA* and *FMC* v. *Pacific Maritime Ass'n*, 435 U.S. 40 (1978). On May 27 1982, the FMC reaffirmed its decision that the Rules were unlawful and ordered the proceedings discontinued. On July 2, 1982, the Court of Appeals vacated *the order discontinuing the proceedings* and directed the Commission to defer action on *Sea-Land Service, Inc.* until it reached final decision in *"50 Mile Container Rules" Implementation by Ocean Common Carriers Serving U.S. Atlantic and Gulf Coast Ports — Possible Violations of the Shipping Act, 1916*, FMC No. 81-11. A hearing has been conducted, briefing is completed, and the decision of the Administrative Law Judge is pending.

[12] The FMC is investigating the lawfulness of the Rules under maritime law for the limited purpose of approving or disallowing proposed

The Court of Appeals concluded that the Steamship Lines possess the right to control the allocation of the work sought by the Rules simply because the Steamship Lines "own or lease the containers." The court's reliance on the bare fact of physical possession and control of the containers conflicts with long established statutory and Supreme Court precedent which prohibits a common carrier from making his equipment available on a discriminatory basis. The Court of Appeals rationale also conflicts with previous decisions of this Court and the Board which recognize that the right of control inquiry must examine an employer's *legal right* to award the disputed work, and not the employer's mere physical power, *NLRB* v. *Enterprise Ass'n of Steam Pipe Fitters, supra; Enterprise Ass'n, Local Union No. 638, 183 NLRB 516 n.2 (1970)* ("We agree with the Trial Examiner's conclusion that, at the time of Respondent's August, 1969 activities, Courter was not neutral because 'there was no legal method by which Courter could comply with the union's demand to fabricate the pipe.'")

A new federal statute enacted by Congress subsequent to the decision of the Fourth Circuit herein reaffirms the maritime principles which deny the Steamship Lines the right to control containers in the manner dictated by the Rules. The Shipping Act of 1984, Public Law No. 98-236, 98 Stat. 67 (March 20, 1984), Section 5(e), provides:

> This Act, the Shipping Act, 1916, and the Intracoastal Shipping Act, 1933, do not apply to maritime labor agreements. *This subsection does not exempt from this Act, the Shipping Act, 1916, or the Intracoastal Shipping*

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tariffs which contain the Rules. The congressional decision to entrust this role to the FMC does not divest the courts of their authority and obligation to take judicial notice of maritime law when necessary to the resolution of the legal issues before them. Thus, this Court need not await yet another FMC ruling to determine the impact of maritime law on an employer's right to control work for purposes of Section 8(b)(4).

> *Act, 1933, any rates, charges, regulations, or practices of a common carrier that are required to be set forth in a tariff, whether or not these rates, charges, regulations, or practices arise out of, or are otherwise related to a maritime labor agreement.* (Emphasis added)

The Rules on Containers clearly are among the "practices of a common carrier that are required to be set forth in a tariff." 46 U.S.C. §§ 817, 844; *Council of North Atlantic Shipping Ass'n* v. *FMC*, 672 F.2d 171, 182 & nn. 96-98. Congress clearly knew of the existence of the Rules litigation. Thus, Section 5(e) of the Shipping Act of 1984 takes care to explicitly provide that the Shipping Acts of 1916 and 1933, upon which the Petitioners rely, do apply to the Rules notwithstanding the fact that they "arise out of . . . a maritime labor agreement."

In Section 10 of the Shipping Act of 1984, Congress again made clear its intent not to immunize the Rules from the restrictions imposed by maritime law. Section 10(b) provides, in relevant part, that "no common carrier . . . may . . . extend or deny to any person any privilege, concession, equipment, or facility except in accordance with its tariffs or service contracts." Furthermore, Section 10(c) provides:

> No conference or group of two or more common carriers may (1) boycott or take any other concerted action resulting in an unreasonable refusal to deal; [or] (2) engage in conduct that unreasonably restricts the use of intermodal services or technological innovations.

The ruling of the Court of Appeals permits a common carrier to evade its legal responsibility to provide service on a non-discriminatory basis merely by negotiating a collective bargaining agreement. This ruling invites the subversion of transportation law by unions and transportation companies inside and outside of the maritime industry. The Supreme Court should settle this important federal question in this case and thereby clarify the right to control principle.

C. This Case Has Great National Importance

The decision of the Court of Appeals resolves nine different Board proceedings involving about 34 ports on the East and Gulf coasts. Following the court's decision below, the Rules have been implemented in every one of these ports. Work opportunities for motor carriers, warehousemen, NVOCCs and their thousands of employees have been reduced.

This petition for certiorari may present this Court with its last opportunity to pass upon the legality of the Rules. To the extent the Board found the Rules lawful, no further complaints will issue, precluding the possibility of conflicts between the Circuits. Furthermore, the ILA and NYSA are currently seeking a writ of mandamus from the Court of Appeals which would enjoin the Board from issuing complaints or otherwise instituting administrative or judicial proceedings with respect to *any* aspect of the Rules as applied in *any* port of the United States. *International Longshoremen's Association* v. *Johansen*, No. 84-1973 (4th Cir. Petition filed September 17, 1984).

While the immediate impact of the Court of Appeals decision is great, its significance extends far beyond the Rules. As this Court recognized in *ILA*, the permissible bounds of work preservation activities presents "an important question of federal labor law." 447 U.S. at 493. The Court of Appeals' and Board's misapplication of this Court's standard for judging the permissibility of work preservation agreements will distort and confuse established doctrines unless clarified by this Court. Similarly, the Court of Appeals' conclusion that transportation law may be disregarded in determining an employer's right to control the instrumentalities of commerce establishes a dangerous precedent which this Court should correct.

CONCLUSION

The Petition for a Writ of Certiorari should be granted as to both questions presented.

Respectfully submitted,

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